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SUPREME COURT, U.S.
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No. 09-1111

In The Supreme Court of the United States

OCTOBER TERM 2009

CITY OF LOS ANGELES, ET AL.,
Petitioners,

v.

COUNTY OF KERN, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners ship biosolids exclusively in intrastate commerce. They contend that the ordinance they challenge will force them to engage in interstate commerce at greater expense. Do Petitioners' interests in *not* engaging in interstate commerce or avoiding the incremental cost of engaging in such commerce come within the "zone of interests" protected by the Commerce Clause?

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STATEMENT OF THE CASE

The Petition presents a one-sided picture of both the scientific uncertainties regarding the land application of biosolids and the effects of the ordinance challenged in this case.

A. Biosolids And Land Application.

Sewage sludge is the "solid, semi-solid, or liquid residue generated during treatment of domestic sewage." 40 C.F.R. §503.9(w). It must be disposed of by landfilling, incineration or land application. 2ER167(¶3).[1] "Land application" means the spraying, spreading or other placement of biosolids onto the land surface, the injection of biosolids below the surface, or the incorporation of biosolids into the soil. 40 C.F.R. §503.11(h). Biosolids are sewage sludge treated for use in land application. 4ER750. The National Research Council of the National Academy of Sciences ("NRC") has found that biosolids may contain "[t]oxic chemicals, infectious organisms, and endotoxins or cellular material." 4ER753.

The EPA regulates sewage sludge disposal in regulations codified at 40 C.F.R. §503. Although the EPA promotes the land application of biosolids (4ER795), it "has consistently recognized at least the potential that biosolids could be dangerous." *City of Los Angeles v. County of Kern*, 509 F. Supp. 2d 865, 871 (C.D. Cal. 2007), Pet. App. 25. The preamble to the EPA regulations, published in 1993, acknowledges that they "'may not regulate all pollutants in sewage sludge that may be present in concentrations that adversely affect public health and the environment.'" *Id.* at 871-72 (quoting 58 Fed. Reg. 9248-01), Pet. App. 25. "The

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[1] "ER" refers to Appellants' Excerpts of Record filed in the Ninth Circuit.

preamble also acknowledges uncertainties in several important aspects of the risk assessment on which the . . . regulations are based, including uncertainties concerning the impacts of land application . . . on human health, plant toxicity, wildlife, and ground water." *Id.* at 872 (citing 58 Fed. Reg. 9248-01), Pet. App. 26.

In 1996, the NRC opined that, "when practiced in accordance with existing federal guidelines and regulations," land application "presents negligible risk to the consumer, to crop production, and to the environment" (3ER579), and that there were no reported outbreaks of infectious disease associated with exposure to "adequately treated" biosolids. 3ER444(¶14). However, in 2000 the EPA's Inspector General concluded that that agency "does not have an effective program for ensuring compliance" with the regulations and thus "cannot assure the public that current land application practices are protective of human health and the environment." 4ER795.

In 2002, "the EPA asked the [NRC] to evaluate the Part 503 regulations by evaluating the technical methods and approaches used to establish chemical and pathogen standards for biosolids, focusing specifically on human health protection (and not ecological or agricultural issues)." 509 F. Supp. 2d at 872, Pet. App. 26. While the NRC found "no documented scientific evidence that the Part 503 rule has failed to protect public health," it acknowledged "anecdotal reports attributing adverse health effects to biosolids exposures, ranging from relatively mild irritant and allergic reactions to severe and chronic health outcomes." *Id.*, Pet. App. 27 (citations and internal quotation marks omitted). The NRC also "found the technical basis of the 1993 [Part 503] chemical standards for biosolids to be outdated" as there "have been substantial advances in risk assessment since then, and there are new concerns about some adverse health outcomes and chemicals not originally considered." 4ER760. The NRC concluded that the EPA's chemical

standards "cannot with confidence be stated to be adequately protective for all of the regulated pollutants." 4ER779.

In addition, the NRC has found that land application raises "'nuisance' risks to community quality of life and property values, such as odors, traffic, and the attraction of vermin to sludge application sites." 4ER820. Indeed, the EPA says that "even the best run operations may emit offensive odors" (4ER813), and that such odors not only cause "public concern" themselves, but also "trigger fears that 'foul-smelling' residues from municipalities and industry must be toxic and harmful." 4ER812.

Land application also raises economic issues. The NRC has recognized that "[d]espite the existence of extensive [federal] regulations, public perceptions of significant risks associated with beneficial land application persist in some areas." 4ER821. As the NRC explained, "[t]he major business risk for farmers and food processors . . . is stigmatization of the product and its source," which can "lead[] to loss of customer confidence, choice of competing products, and loss of market share on regional and even national scales." 509 F. Supp. 2d at 880 (citation and internal quotation marks omitted), Pet. App. 47. Because "factors other than scientific realities frequently affect the public's beliefs about its food supply," such risks exist even if land application is restricted to crops used for animal feed. *Id* at 880-81, Pet. App. 48.

B. Land Application In Kern County.

Petitioner City of Los Angeles ("LA") treats wastewater for approximately four million residents. 2ER123-24(¶10). Since 1994, LA has land applied biosolids at Green Acres, a 4700-acre farm in the County's unincorporated area. 2ER122-23(¶7).

Plaintiffs' expert described Green Acres as "one of the best monitored and professionally operated land application

sites." 3ER498(¶10). Nevertheless, the District Court found that Green Acres "emanates strong odors and attracts an unusual amount of flies." 509 F. Supp. 2d at 873, Pet. App. 30. Green Acres also lies next to the Kern Water Bank, which stores water in the underground aquifer for extraction during dry years (2ER244(¶2), 245-46(¶8)); it is also twelve miles from another aquifer. 2ER235(¶12). When groundwater is pumped during dry years, groundwater levels can drop rapidly, potentially causing groundwater from under Green Acres to move into these aquifers. 2ER235(¶12), 245-46(¶8). Accordingly, the District Court found that "the groundwater from beneath Green Acres could flow into the water banks when water is extracted from them during dry seasons." 509 F. Supp. 2d at 901, Pet. App. 97. The court concluded that "[e]ven given the apparently low ***likelihood*** that land application [at] Green Acres would introduce contaminants into the groundwater, the ***tremendous amount*** of harm to the water banks that could result is sufficiently palpable that a trier of fact could conclude Green Acres is not an ideal location." *Id.* (emphases in original; citations omitted)).

County Sanitation District No. 2 of Los Angeles County ("CSD2") treats wastewater for approximately 5.1 million residents. 3ER643(¶2). Between 2003 and 2005, CSD2 supplied most of its biosolids to San Joaquin Composting ("SJC") in Kern County for composting and later land application in Kern and other counties. *See* 2ER170(¶14); 3ER644(¶5). It land applied the remainder at Honey Bucket Farms in unincorporated Kern County. *See* 3ER644(¶5). Honey Bucket Farms is located in a flood zone. 4ER806. Land application at Honey Bucket Farms could degrade groundwater, which might be only twenty feet below the surface. *Id.*

C. Measure E And Its Effects.

The concerns expressed by the EPA and the NRC about the risks inherent in land applying biosolids are reflected in Kern County Measure E, the "Keep Kern Clean Ordinance of 2006" (the "Ordinance"). 4ER688-89(¶1), Pet. App. 122-29. Measure E is based on legislative findings, contained in the Ordinance, that

> [t]here are numerous serious unresolved issues about the safety, environmental effect, and propriety of land applying Biosolids or sewage sludge, even when applied in accordance with federal and state regulations. Biosolids may contain heavy metals, pathogenic organisms, chemical pollutants, and synthetic organic compounds, which may pose a risk to public health and the environment even if properly handled. (Pet. App. 123-24)

Measure E also states that land application "presents risks of unique odor, insect attraction, and other nuisances which are unacceptable to the people of Kern County." 4ER731, Pet. App. 124.

Measure E makes it "unlawful for any person to Land Apply Biosolids to property within the unincorporated area of the County." 4ER732 (§8.05.040(A)), Pet. App. 126. It therefore prohibits land application in the County's unincorporated areas regardless of whether the biosolids were generated inside or outside the County. Measure E applies only in the County's unincorporated areas because Article XI, Section 7 of "the California Constitution specifies that the police power bestowed upon a county may be exercised 'within its limits,' i.e., only in the unincorporated area of the county." *City of Dublin v. County of Alameda*, 14 Cal. App. 4th 264, 274-75 (1993). Thus, as the District Court acknowledged, "the incorporated areas of the County

necessarily lie beyond Kern's jurisdiction." 509 F. Supp. 2d at 876, Pet. App. 36.

Kern has been sending sludge to SJC since 2004, to be made into compost and sold. 4ER738-39(¶7). While the District Court stated that the County "ships its materials to [SJC] for sale to private firms out of its jurisdiction" (509 F. Supp. 2d at 869, Pet. App. 19), in fact no record evidence shows where SJC sends the compost it makes from the County's biosolids. Of course, the compost made by SJC must be land applied in jurisdictions "that will allow land application." 509 F. Supp. 2d at 875 n.6, Pet. App. 35 n.6. But the same is true for the much greater volume of biosolids that Petitioner CSD2 provides to SJC. *See* p.4, *supra*. Accordingly, Measure E reduces the number of SJC's markets and increases the distance to these markets (2ER170-71(¶14)), thus potentially increasing costs for *both* Respondent Kern and Petitioner CSD2.

Petitioners complain that enforcement of Measure E will require them to divert their biosolids from California to Arizona, at increased cost. Pet. 6. In other words, Petitioners contend that Measure E violates the Commerce Clause because it *requires* them to engage in interstate commerce that they would prefer to forgo. However, they do not contend that they want to dispose of out-of-state biosolids in Kern County or that anyone else (from inside or outside the State) wishes to do so.[2]

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[2]The Petition does state more than once that Measure E "primarily" or "principally" affects intrastate entities. Pet. 13, 26, 27. These statements are misleading. The Ordinance *only* affects such entities, because no out-of-state entity wants to land apply biosolids in Kern County.

D. The Proceedings Below.

Petitioners' Complaint asserted, *inter alia*, that Measure E (1) violates the dormant Commerce Clause, (2) violates the Equal Protection Clause, and (3) is pre-empted by the California Integrated Waste Management Act ("the Act"). Pet. App. 6. The District Court first enjoined enforcement of Measure E, concluding that Petitioners had demonstrated both irreparable harm and a likelihood of success on their Commerce Clause claim, their police power claim and their claim that Measure E was preempted by the Act. *City of Los Angeles v. County of Kern*, 462 F. Supp. 2d 1105, 1108-09 (C.D. Cal. 2006). The court then granted summary judgment on Petitioners' Commerce Clause and state-law preemption claims. 509 F. Supp. 2d at 870, Pet. App. 21-22. The court entered a final judgment under Rule 54(b). 1ER1. Respondents appealed.

In an opinion by Judge O'Scannlain, the Ninth Circuit unanimously dismissed Petitioners' Commerce Clause claim for lack of prudential standing and remanded the case to the District Court for reconsideration of whether it should exercise supplemental jurisdiction over Petitioners' state-law claim. Pet. App. 17.[3]

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[3]Petitioners state that "in the court of appeals Kern initially took the position that it had waived the [prudential standing] issue." Pet. 9. This is incorrect. Respondents' opening brief in the Ninth Circuit did acknowledge that they had not raised prudential standing in the District Court, and that circuit precedent therefore precluded them from raising that issue on appeal. *See* Appellants' Opening Brief 37-38. However, Respondents also noted that there is a circuit split on the waiver issue (*see* Pet. App. 8 n.3), and urged the court, as an alternative to resolving the merits, to "take this case *en banc*, hold that 'prudential standing' issues can be raised on appeal even if they were not raised in the District Court and hold that [Petitioners] have no standing to contend that Measure E violates the Commerce Clause." Appellants' Opening Brief 38. In all events, the circuit split as to whether prudential standing is

(continued . . .)

Contrary to Petitioners' claim, the Ninth Circuit did not hold that "shipping biosolids from one part of California to another and the related recycling work does not occur in interstate commerce." Pet. 23. Instead, the court held that the *interest* Petitioners seek to protect—the right to ship biosolids from Southern California to elsewhere in California—is not within the "zone of interests" protected by the Commerce Clause. As the court explained:

> The interest [Petitioners] seek to secure is their ability to exploit a portion of the *intra*state waste market—they want to be able to shift their waste from one portion of California to another. But as we have said the "chief purpose underlying [the dormant Commerce] Clause is to limit the power of States to erect barriers against *inter*state trade." Nothing in Measure E hampers [Petitioners'] ability to ship waste out of state. Likewise, no [Petitioner] claims to apply out-of-state waste to land in Kern County. In short, Measure E in no way burdens [Petitioners'] protected interest in the interstate waste market. We decline to expand the zone of interests protected by the Clause to purely intrastate disputes. (Pet. App. 14 (citation omitted; emphases in original))

The court then rejected Petitioners' argument that they came within the "zone of interests" protected by the Commerce Clause because Measure E would supposedly force them to ship their biosolids to Arizona at greater expense:

(. . . continued)

waived if not raised in the District Court is irrelevant in light of the Court of Appeals' decision to reach the issue *sua sponte*, and Petitioners do not rely on that split as a basis for granting review.

> The recyclers miss the point when they contend that if Measure E stands, some of them will be forced to pay higher fees to ship their waste to different sites, likely in Arizona. While this injury-in-fact suffices for Article III purposes, it is insufficient to establish prudential standing. As the name implies, the zone of interests test turns on the *interest* sought to be protected, not the *harm* suffered by the plaintiff. Financial injury, standing alone, does not implicate the zone of interests protected by the dormant Commerce Clause. That financial injury must somehow be tied to a barrier imposed on interstate commerce. The recyclers here have not established that requisite link. (Pet. App. 14-15 (citations omitted; emphases in original))

In summary, the Ninth Circuit held that Petitioners "either contend that Measure E prevents them from shipping their waste intrastate or that they are being denied the benefits of such shipments.... [S]uch circumstances do not implicate the interests protected by the dormant Commerce Clause." Pet. App. 16-17.

Petitioners then filed a petition for rehearing and rehearing en banc. The petition was denied, with no Ninth Circuit judge voting to grant rehearing.

REASONS FOR DENYING THE WRIT

Petitioners assert that the decision below presents an inter-circuit conflict, a conflict between the decision below and decisions of this Court and an important and recurring question regarding prudential standing. None of these assertions is correct.

First, there is no inter-circuit conflict. No Court of Appeals decision holds that the desire to engage in *intrastate* commerce, or to avoid the cost of engaging in *interstate*

commerce comes within the zone of interests protected by the Commerce Clause. Moreover, the assertedly conflicting cases cited by Petitioners all involve "flow control" ordinances that actually impose barriers to interstate commerce because they require that interstate commerce be diverted to a particular facility. Measure E is not a "flow control" ordinance. Unlike the ordinances challenged in the cases cited by Petitioners, Measure E imposes no barrier to *any* interstate transaction, shipment or activity—on the part of Petitioners or anyone else. Accordingly, Petitioners' challenge to Measure E does not invoke any interest protected by the Commerce Clause. *See* Part I, *infra*.

Second, that conclusion does not conflict with any of this Court's cases. The argument of Petitioners and their *amici* to the contrary fails to distinguish between the scope of the Commerce Clause and the "zone of interests" protected by that constitutional provision. Indeed, the cases cited by Petitioners that expand the scope of the Commerce Clause to reach certain intrastate activities do not even mention prudential standing. Nor does the decision below contradict the cases from this Court holding that in-state plaintiffs have standing to challenge state or local ordinances that impair their ability to engage in interstate commerce. No such impairment exists in this case. *See* Part II, *infra*.

Third, the standing question Petitioners present is neither important nor recurring. Neither Petitioners nor their *amici* have identified another local ordinance that mirrors Measure E. Even if such an ordinance were to be promulgated, the decision below would not bar a constitutional challenge unless (as here) no plaintiff could demonstrate that the ordinance adversely affected interstate commerce. Moreover, the standing issue Petitioners present is not even outcome-determinative in this case. Even if Petitioners could demonstrate standing, they cannot show that Measure E discriminates in violation of the Commerce Clause. *See* Part III, *infra*.

Fourth, and finally, the decision below is correct, for reasons other than those given by the Ninth Circuit. Petitioners complain that Measure E discriminates against out-of-county (but in-state) governmental entities in favor of governmental entities located in the county (and, of course, in the state). But Petitioners' interest in being free from such discrimination is not within the "zone of interests" protected by the Commerce Clause, for two separate and independent reasons. First, the Commerce Clause does not reach discrimination between different parts of the same State. Second, the Commerce Clause permits discrimination between public entities. *Dep't of Revenue v. Davis*, 553 U.S. 328 (2008). This dispute between public entities located in the same state should be resolved by the state courts pursuant to state law.

The opposite result would frustrate the purposes served by the "zone of interests" tests. If Petitioners have standing to challenge a local ordinance even though it does not adversely affect *their* abilit y to engage in interstate commerce, so will any other plaintiff challenging a local ordinance that affects local economic interests. Consequently, reversal of the Ninth Circuit's decision would allow a host of challenges to local environmental and economic regulations without any showing that the challenged ordinance has an adverse impact on interstate commerce. That result would seriously impair the federalism and separation of powers concerns that the "zone of interests" test was designed to protect. *See* Part IV, *infra.*

I.

THERE IS NO INTER-CIRCUIT CONFLICT.

As the Court of Appeals recognized, Petitioners "contend that Measure E prevents them from shipping their waste intrastate, or . . . denie[s] [them] the benefits of such

shipments." Pet. App. 17. No Court of Appeals—including the cases cited by Petitioners—has ever held that the desire to reap the benefits of *intrastate* commerce, and avoid the incremental cost of engaging in *interstate* commerce, comes within the "zone of interests" protected by the Commerce Clause. Accordingly, there is no circuit split.

Moreover, both of the Court of Appeals cases that Petitioners claim conflict with the decision below involve "flow control" ordinances.[4] Such ordinances typically require all locally generated waste to be collected by local haulers, processed by local transfer stations or deposited in local landfills. *See, e.g., C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 386 (1994) ("We consider a so-called flow control ordinance, which requires all solid waste to be processed at a designated transfer station"). Such ordinances can impair interstate commerce in two distinct ways. First, requiring use of local haulers, transfer stations or landfills deprives out-of-state waste processors of access to the local market for waste disposal. *See id.* (Clarkstown flow control ordinance violated Commerce Clause "by depriving competitors, including out-of-state firms, of access to a local market"). Second, requiring use of local haulers, transfer stations or landfills can prevent processors of locally generated garbage from accessing facilities located across state lines. *See id.* at 388 (ordinance also prevented plaintiff from shipping waste generated in Clarkstown and processed at its facility to out-of-state landfills).

Consequently, finding a plaintiff with standing to challenge a flow control ordinance is not difficult. The plaintiff can claim either an interest in access to the interstate market in processing solid waste or an interest in obtaining the

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[4] *See Houlton Citizens' Coal v. Town of Houlton*, 175 F.3d 178 (1st Cir 1999), *Ben Oehrleins & Sons & Daughter, Inc v. Hennepin County*, 115 F.3d 1372 (8th Cir. 1997).

economic benefits created by the free flow of such waste in interstate commerce. Both of these interests are unquestionably within the "zone of interests" protected by the dormant Commerce Clause. *See H.P. Hood & Sons, Inc. v Du Mond*, 336 U.S. 525, 539 (1949) ("Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them").

Unlike the ordinances in the cases cited by Petitioners, Measure E is not a flow control ordinance that excludes out-of-state business from a local market or prevents local waste from being processed out-of-state. *See* Pet. App. 14 ("Nothing in Measure E hampers the recyclers' ability to ship waste out of state. Likewise, no recycler claims to apply out-of-state waste to land in Kern County"). Instead, through Measure E the County seeks to surrender the economic benefits caused by the local market in recycling in order to serve other, primarily non-economic values (such as eliminating the flies and odors caused by land application).[5] Moreover, while Measure E bans land application of all biosolids,

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[5]The in-county economic costs of Measure E are not inconsiderable When they moved for (and obtained) a preliminary injunction, Petitioners argued that enforcing the Ordinance would cause irreparable injury not only to the out-of-county governmental Petitioners, but also to the in-county private Petitioners. Appellants' Supplemental Excerpts of Record 28 (filed in the Ninth Circuit) ("The private Plaintiffs who work at Green Acres, and their employees, will also suffer irreparable harm" if Measure E is enforced). Having successfully alleged that enforcement of Measure E would cost in-county businesses millions of dollars and eliminate dozens of in-county jobs, Petitioners cannot contend that Measure E discriminates because it "shift[s] the costs of regulation" to outsiders. Pet. 10-11.

whether generated in-state or out-of-state, no one has *ever* sought to land apply biosolids from outside California in the County. Accordingly, the Ordinance does not adversely affect *any* out-of-state business or public entity, or *any* existing interstate commerce. In short, unlike the flow control ordinances at issue in *Carbone* and its progeny, Measure E does not "burden interstate commerce or impede its free flow." *Carbone*, 511 U.S. at 389.[6]

As a result, the "flow control" cases cited by Petitioners are easily distinguishable from this case. For example, in *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372 (8th Cir. 1997), a county ordinance required that most solid waste "be delivered only to County-designated transfer stations or processing facilities." *Id.* at 1377. Accordingly, the court found that "the Ordinance harms processors such as the landfill plaintiffs who wish to participate in the market for Hennepin County waste by prohibiting access to that waste." *Id.* at 1379. The court held that these plaintiffs had sustained a sufficient injury-in-fact to show constitutional standing and added—in a single conclusory sentence—that there were "no prudential barriers to standing" for these plaintiffs, either. *Id.*

There is no conflict between this holding and the decision below. The plaintiffs in *Ben Oehrleins* included an out-of-state (Iowa) landfill. *Id.* at 1378. That landfill was harmed by being excluded from the market for processing Hennepin County waste. *Id.* at 1379. That was sufficient to establish standing in *Ben Oehrleins* because only one

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[6]Of course, any ordinance that facially discriminated against out-of-state interests by permitting only in-state waste to be deposited locally could be challenged by an out-of-state plaintiff who suffered an injury as a result of this facial barrier to interstate commerce. *See City of Philadelphia v New Jersey*, 437 U S. 617 (1978). But such an ordinance has no resemblance to Measure E, which is not facially discriminatory and which affects no generator of waste outside California.

plaintiff need have standing for a case to proceed. *Bowsher v. Synar*, 478 U.S. 714, 721 (1986). In contrast, the plaintiffs in this case do not include *any* out-of-state entity, much less one that claims harm from Measure E.

Petitioners seek to blur this distinction by implying (as did the Ninth Circuit) that *Ben Oehrleins* granted standing to "in-state haulers and processors" who challenged a local ordinance that affected only "waste designated for in-state disposal." Pet. 15; *see also* Pet. App. 16 n.8. This is doubly incorrect. In the first place, as just discussed, since the out-of-state landfill plaintiff in *Ben Oehrleins* unquestionably had standing to challenge its exclusion from the local market, the court's discussion of the other plaintiffs' standing was unnecessary to its decision and therefore *dictum*. That discussion therefore provides no basis for granting the Petition.

Moreover, the ordinance challenged in *Ben Oehrleins* did not apply only to intrastate waste, and the court's discussion of standing did not depend on any such erroneous premise. Before the *Ben Oehrleins* litigation was commenced, the county passed a resolution stating that, until further notice, it would not enforce the ordinance against "waste destined for disposal outside the State." 115 F.3d at 1378 (citation and internal quotation marks omitted). At the same time, it amended the ordinance to make its application to in-state waste severable from its application to waste going outside of Minnesota. *See id.* at 1384. But by its terms the ordinance continued to apply to waste shipped interstate; neither the parties nor the court suggested that the county's voluntary decision to stop applying the ordinance to interstate waste rendered the constitutionality of that application moot[7]; and the *Ben Oehrleins* court reached the merits of the

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[7]Any such contention would have been untenable. "Voluntary cessation does not moot a case or controversy unless subsequent events

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issue, deciding that application of the ordinance to interstate waste was unconstitutional. *Id* at 1384-85. The court's discussion of standing did not differentiate between the plaintiffs' claims with respect to interstate and intrastate waste. *See id.* at 1377-79. Consequently, the court did not hold that in-state plaintiffs had standing to challenge an ordinance that applied only to waste destined for disposal within Minnesota; instead, it held—quite properly—that in-state plaintiffs could challenge an ordinance that, *inter alia*, restricted their ability to send waste out-of-state. As a result, there is no conflict between the standing holding in *Ben Oehrleins* and the decision below, which concerns neither an out-of-state plaintiff nor an ordinance with an adverse impact on the interstate waste market.

Petitioners also contend that a conflict exists between the decision below and *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178 (1st Cir. 1999), which the Ninth Circuit did not even cite in its opinion. Like the ordinance at issue in *Ben Oehrleins*, the challenged ordinance in *Houlton Citizens' Coalition* required all residential waste to be collected by a single designated firm or brought directly to the Town's transfer station. 175 F.3d at 181. However, the Town's designated hauler was *not* required to dispose of the waste *it* collected at the Town's transfer station. Instead, it could "contract with whomever [it] chooses to process the garbage and effectuate disposal at any lawful site within or without the state." *Id.* at 189; *see id.* at 181 (Town's contractor "is permitted to dispose of collected trash at any proper disposal site").

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ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (citation and internal quotation marks omitted)

Petitioners make much of the fact that the plaintiff held to have standing in *Houlton* (a local hauler named Faulkner) had not alleged "that he hauled garbage out-of-state or planned to do so." *Id.* at 183. But that is unsurprising. As just noted, the challenged ordinance permitted the designated hauler to deposit the waste it collected at any lawful disposal site, either in-state or out-of-state. Consequently, by not being chosen as the designated hauler, Faulkner was deprived of the ability to access part of the market in interstate waste. Thus, like the in-state haulers and processors in *Ben Oehrleins* and unlike the Petitioners in this case, Faulkner was subject to (and injured by) an ordinance that imposed barriers to his participation in interstate commerce. Accordingly, his challenges to the ordinance advanced interests congruent with the goal of the dormant Commerce Clause—*i.e.*, limiting the state's ability to erect discriminatory barriers to interstate commerce—without the need to allege that he intended to ship waste out-of-state.

Indeed, the interest Petitioners seek to advance in this case is fundamentally antithetical to the purposes served by the Commerce Clause. As noted above, flow control ordinances are subject to challenge if they prevent a waste hauler from taking advantage of cheaper *interstate* disposal alternatives. *See, e g., United Haulers Ass'n v Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 337 (2007). In contrast, in this case the supposedly lower cost alternative is *intrastate* disposal, inasmuch as Petitioners contend that Measure E will force them to dispose of their biosolids in Arizona rather than California, at greater cost. Pet. 6. As noted above, however, the Commerce Clause does not protect local businesses against the incremental cost of engaging in interstate, rather than intrastate, commerce. Nor is the Clause violated simply because Measure E might force

Petitioners to engage in such commerce.[8] Accordingly, Petitioners' interest in *avoiding* the costs of interstate commerce is "marginally related to or inconsistent with the purposes implicit" in the dormant Commerce Clause. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987). No case holds otherwise.[9]

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[8]To the contrary, the Courts of Appeals have repeatedly held that the Commerce Clause does not invalidate local measures that *benefit* interstate commerce or interstate competitors. *See, e.g., Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 857 (9th Cir. 2002) (initiative banning trade in fur of animals caught in leghold traps in California was not discriminatory under Commerce Clause; because it did not apply to in-state trade of furs from animals caught with similar traps outside California, it benefited "interstate commercial activities"), *amended on other grounds*, 312 F.3d 416 (9th Cir. 2002); *Ben Oehrleins*, 115 F.3d at 1385 (local ordinance that, *inter alia*, required waste destined for disposal within the state to use specified transfer stations or processing facilities, but did not impose similar requirement on waste destined for disposal out-of-state, was not subject to strict scrutiny because "market controls that inure to the benefit of out-of-state concerns simply do not constitute 'discrimination' under the Commerce Clause"); *Reynolds v. Buchholzer*, 87 F.3d 827, 830 (6th Cir. 1996) (nondiscriminatory ban on commercial walleye fishing in-state did not violate Commerce Clause where "'out-of-state fishermen . . may market their walleye in Ohio without local competition'") (citation omitted).

[9]As the court below found, Measure E is functionally indistinguishable from an ordinance banning land application of only in-state biosolids. Pet. App. 15. By definition, such an ordinance could not be discriminatory under the Commerce Clause, because it would not discriminate against out-of-state biosolids. *See IESI AR Corp. v. Nw. Arkansas Reg'l Solid Waste Mgmt. Dist.*, 433 F.3d 600, 605 (8th Cir. 2006) (flow control ordinance requiring that waste be disposed of at either in-district or out-of-state landfills did not violate Commerce Clause); *Ben Oehrleins*, 115 F.3d at 1385-86 (county may enforce flow control restrictions on in-state waste). Indeed, this Court held only a few years ago that a fee imposed only on intrastate commercial hauling did not violate the Commerce Clause. *Am. Trucking Ass'ns, Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429 (2005).

II.

THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF THIS COURT.

Contrary to Petitioners' arguments (Pet. 18-26), the decision below does not conflict with this Court's Commerce Clause jurisprudence. Petitioners' conflict claim rests on a misreading of the Ninth Circuit's opinion, and a misunderstanding of this Court's cases.

Petitioners' conflict claim is based on what they describe as "the Ninth Circuit's holding that the intrastate shipment of biosolids does not occur in interstate commerce." Pet. 23. Their *amici* rely on the same premise. *See, e.g.*, Brief of Amici Curiae Metropolitan Water Reclamation District of Greater Chicago, *et al.* ("MWRD Br.") 10 ("The Ninth Circuit erred in holding that biosolids recycling operations . . . do not involve articles in interstate commerce simply because the biosolids do not cross state lines"); Brief of Amici Curiae The National Ass'n of Clean Water Agencies, *et al* ("NACWA Br.") 5 (referring to "[t]he Ninth Circuit's decision that biosolids recycling is not an activity in interstate commerce"). But the Ninth Circuit made no such holding. Instead, it held only that Petitioners' desire to "ship their waste from one portion of California to another" (Pet. App. 14) is not within the "zone of interests" protected by the Commerce Clause. In other words, the argument of Petitioners and their *amici* confuses the *scope* of the Commerce Clause with the *interests* it protects.[10]

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[10]While Petitioners challenge the portion of the Ninth Circuit's decision that their interest in shipping biosolids from one part of California to another is not within the "zone of interests" protected by the Commerce Clause, they do not mention—much less controvert—the Court of Appeals' alternative holding that Petitioners' interest in avoiding the incremental cost of engaging in interstate commerce is similarly

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That the two are different is easily demonstrated. Suppose a hypothetical flow control ordinance required all residents of a city to have their garbage hauled by a designated franchisee, which was then required under the ordinance to dispose of the waste at a nearby landfill in another state. Suppose, also, that a local citizen claimed that the ordinance violated the Commerce Clause because he could dispose of his garbage more cheaply within the state. Under the decision below, the plaintiff would not have prudential standing to challenge the ordinance because his interest in obtaining cheaper garbage disposal within the state was not protected by the Commerce Clause, even though the hypothetical ordinance (unlike Measure E) affects interstate commerce, and would therefore be subject to Commerce Clause scrutiny if challenged by a proper plaintiff (for example, another out-of-state landfill that was adversely affected by the ordinance's selection of its competitor as the designated disposal facility). In other words, the prudential standing inquiry looks to the interest of the particular plaintiff, and how the challenged ordinance affects it, rather than whether the subject of the ordinance is within the scope of the Commerce Clause.[11]

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unprotected. Their silence on this critical point speaks volumes.

[11]Petitioners' conflict claim also depends on linguistic obfuscation. They argue that the "transport of biosolids from one location in California to another . . . constitute[s] interstate commerce" under this Court's cases construing congressional power under the Commerce Clause. Pet. 26. That is not correct. As Petitioners themselves recognize, cases such as *Gonzales v Raich*, 545 U.S. 1 (2005), and *Wickard v. Filburn*, 317 U.S. 111 (1942), stand for the proposition that Congress has power under the Commerce Clause to regulate intrastate "'activities that substantially affect interstate commerce.'" Pet. 18 (citation omitted) Consequently, the fact that *intrastate* activity (like the intrastate transport of biosolids) may be regulated by Congress does not mean that it is *part* of *interstate* commerce; instead, these intrastate activities can be

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Similarly, the fact that intra-state application of biosolids is regulated by Congress and the EPA pursuant to the Commerce Clause (Pet. 24-25) is irrelevant to this case. Because solid waste is an article of interstate commerce (*City of Philadelphia v. New Jersey*, 437 U.S. 617, 622-23 (1978)), Congress has the power to regulate both that commerce and intrastate activities that affect it. *See, e g., Gonzales v. Raich*, 545 U.S. 1 (2006); *Wickard v. Filburn*, 317 U.S. 111 (1942). But that power does not displace state regulation of the same commerce. *Grant's Dairy-Maine, LLC v. Comm'r of Maine Dep't of Agric.*, 232 F.3d 8, 19 (1st Cir. 2000) ("Nothing in the Court's opinion intimates that a State may not regulate in areas that touch upon interstate commerce").[12] The fact that Congress has regulatory power over *intrastate* activities that have an interstate impact does not automatically give Petitioners standing to challenge an ordinance that effectively regulates only intrastate (rather than interstate) waste disposal.

Moreover, Petitioners' reliance on cases such as *Raich* and *Wickard* ignores the obvious difference between plaintiffs who challenge an affirmative exercise of federal power under the Commerce Clause and plaintiffs (like Petitioners) who claim that the exercise of state or local law-making authority violates the dormant Commerce Clause. The plaintiffs in *Wickard* and *Raich* contended, *inter alia*, that the challenged federal law or its application to them *exceeded*

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regulated because they "substantially affect" interstate commerce.

[12]Similarly, Congress' power under the Commerce Clause is not affected by state regulation, whether it violates the Clause or not. *See Raich*, 545 U S. at 29 ("state action cannot circumscribe Congress' plenary commerce power"); *United States v Darby*, 312 U.S. 100, 114 (1941) ("That power can neither be enlarged nor diminished by the exercise or non-exercise of state power")

the scope of Congress' power under the Commerce Clause. *See, e g., Raich,* 545 U.S. at 15 (plaintiffs argued "that the CSA's categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress' authority under the Commerce Clause"); *Wickard,* 317 U.S. at 113-14. However, such claims by definition do *not* invoke an interest protected by that constitutional provision. Accordingly, *Raich* and *Wickard* say nothing about the "zone of interests" protected under the Commerce Clause when that provision is invoked *as a basis* for challenging state or local regulations.

The dormant Commerce Clause cases Petitioners cite are no more relevant. Neither *Hughes v. Oklahoma,* 441 U.S. 322 (1979), nor *Camps Newfound/Owatonna, Inc. v. Town of Harrison,* 520 U.S. 564 (1997), involves—or even mentions—prudential standing. Accordingly, no conflict exists between these cases and the decision below.[13]

Petitioners attempt to manufacture a conflict by asserting that the decision below is similar to an argument rejected by this Court in *Camps Newfound.* There the respondent contended that the Commerce Clause was not violated by a discriminatory tax ordinance because the petitioner, which operated a summer camp, provided services that were "consumed locally." *Id.* at 573. The Court rejected the argument because "[t]he services that petitioner provides to its principally out-of-state campers clearly have a substantial effect on commerce, as do state restrictions on making those services

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[13]The grab-bag of lower court cases cited by *amicus* MWRD likewise do not concern prudential standing. *See* MWRD Br. 22-23. Moreover, all these cases involved facially discriminatory flow control bans that adversely affected interstate commerce. In contrast, Measure E is not a flow control ordinance and does not affect any existing interstate commerce.

available to nonresidents." *Id.* at 574. Indeed, the petitioner in that case was able to claim Commerce Clause discrimination precisely because the tax exemption at issue did not apply to "organizations operated principally for the benefit of non-residents" and "[a]bout 95 percent of the campers are not residents of Maine." *Id.* at 567.

This case would be similar to *Camps Newfound* if Petitioners could show that 95 percent of the biosolids dumped in the County prior to Measure E came from outside California, and Petitioners were in-state businesses that land applied this out-of-state sludge. But neither of these propositions is true. *No* biosolids dumped in the County prior to Measure E came from outside California and Petitioners neither constitute out-of-state entities nor represent their interests. Consequently, this Court's holding in *Camps Newfound* that the Commerce Clause prohibits "[o]fficial discrimination that limits the access of nonresidents to summer camps" (*id.* at 573) has no bearing on an ordinance that as a practical matter limits *no* out-of-state access to County land.

In short, none of this Court's cases cited by Petitioners holds—or even suggests—that a local ordinance can be challenged under the Commerce Clause by plaintiffs who have failed to show that the measure burdens either their own interstate commerce or that of anyone else. The cases Petitioners cite are therefore irrelevant.[14]

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[14]Petitioners claim that the decision below did not "address this Court's repeated admonitions that restrictions on interstate commerce erected by political subdivisions of states are equally subject to dormant Commerce Clause scrutiny." Pet. 24. The charge is untrue. The Court of Appeals expressly recognized that a "state's political subdivisions are likewise precluded from impeding interstate commerce." Pet. App. 12 n.5.

Similarly, Petitioners cite *Carbone, Dean Milk Co. v City of Madison*, 340 U.S. 349 (1951), and *Brimmer v Rebman*, 138 U S 78 (1891), for the proposition that a local law that impermissibly regulates

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III.

THE ISSUE PRESENTED IS NEITHER IMPORTANT NOR RECURRING.

Even if there were a conflict between the decision below and the decisions of other Circuits or this Court, this case would not be the best vehicle to resolve them. That is because the issue this case presents is neither important nor recurring—and, indeed, is not even outcome-determinative in this very case. If the Court feels the need to illuminate the

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interstate commerce is not saved by the fact that it also discriminates against in-state actors. Pet. 18-19; *accord id.* at 23. However, unlike the laws invalidated in these cases, Measure E does not regulate *any* interstate commerce, because no one from outside California wants to land apply biosolids within the County. These decisions are therefore inapposite.

Finally, Petitioners claim that it would be anomalous if a law that discriminated against both in-state and out-of-state businesses could only be challenged by the latter. Pet. 19. But this is hardly self-evident. After all, it is not uncommon for some plaintiffs to have standing while others do not. *See, e g , Gladstone, Realtors v Village of Bellwood*, 441 U.S. 91, 112-13, 113 n 25 (1979) (residents of village had standing to challenge discriminatory practices alleged to injure only village residents, but non-resident co-plaintiffs had no standing). Moreover, as the Ninth Circuit recognized, in-state plaintiffs can sue under the Commerce Clause in cases involving "impediments to in-state plaintiffs' access to out-of-state markets, restrictions on the ability of out-of-state entities to make use of in-state plaintiffs' services, or burdens on out-of-state entities which were passed on to in-state plaintiffs." Pet. App. 16 (collecting cases). Accordingly, there is no basis for Petitioners' claim that, under the decision below, local ordinances violating the Commerce Clause will be left on the books due to the absence of plaintiffs with standing to challenge them. Indeed, in the very case cited by Petitioners (*Brimmer v Rebman*, 138 U.S. 78 (1891)), the statute could be—and was—challenged by an in-state meat seller arrested for selling meat he had purchased from out-of-state.

contours of prudential standing, it should await a case where the outcome would matter to both the litigants and, more importantly, the public at large.

Both Petitioners and their *amici* contend that land application is a national business. *See* Pet. 27-28; MWRD Br. 2-8; NACWA Br. 12-20. Yet neither Petitioners nor their *amici* have identified a single regulation other than Measure E that prohibits land application of biosolids regardless of origin.[15] While they claim that other communities will institute such bans in the future if Measure E is upheld, such unsubstantiated speculation does not transform a unique local situation into a national issue of exceptional importance. Moreover, even if a second jurisdiction promulgated an identical ordinance, the decision below would not bar a constitutional challenge unless (as here) no plaintiff could demonstrate that the ordinance adversely affected interstate commerce. *See* Pet. App. 17 (Petitioners argued only that "Measure E prevents them from shipping their waste *intra*state, or that they are denied the benefits of such shipments") (emphasis added).[16]

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[15]The MWRD *amicus* brief illustrates why this is so. It concedes that many local communities and agricultural interests welcome land application because of its supposedly beneficial qualities. *See, e.g.*, MWRD Br. 3 ("Denver Metro has a waiting list of local farmers requesting its biosolids"); *id* at 5 ("Demand for [King County] biosolids exceeds the supply"). Moreover, the only two instances where local governments even threatened to enact legislation banning the land application of biosolids all involved facially discriminatory local ordinances that applied only to biosolids from outside the local jurisdiction. *See id.* at 20-21. As discussed in Part I, the standing issues raised by such flow control ordinances are quite different than those presented here.

[16]One *amicus* attempts to circumvent the fact that Measure E is unique by arguing that the Court must consider what could happen if other jurisdictions adopted similar legislation. NACWA Br. 18-19 (citing *Healy v Beer Inst.*, 491 U.S. 324, 336 (1989), and *Carbone*, 511 U.S. at 406). But in both of these cases the challenged law *itself* affected

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Nor can Petitioners show that Measure E engages in the type of discrimination prohibited by the Commerce Clause. *See* Part IV(A), *infra*. Hence, even if Petitioners had standing, their Commerce Clause challenge would fail on the merits. Far from being "important and recurring" (Pet. 26), the standing issue addressed in the Petition has no practical significance even for the outcome of this case.

IV.

THE NINTH CIRCUIT'S DECISION WAS CORRECT.

A. There Are Additional Reasons Why Petitioners' Discrimination Claim Is Not Within The "Zone Of Interests" Protected By The Commerce Clause.

The Ninth Circuit's decision was correct for additional reasons beyond those canvassed in its opinion. As the District Court found, and Petitioners acknowledge, "biosolids management is a 'constant, nondiscretionary governmental function.'" Pet. 4 (quoting Pet. App. 25). Both the out-of-county (but in-state) biosolids generators that Measure E purportedly discriminates against and the in-county biosolids generators that Measure E supposedly favors are public entities. Consequently, the interest that Petitioners seek to advance under the Commerce Clause is a supposed right to be free from discrimination against out-of-county (but in-state) public entities in favor of their in-county counterparts.

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interstate commerce. That is not true here. Accordingly, the Court must assume that the hypothetical ordinances *amicus* envisions would no more affect interstate commerce than does Measure E. Ten times zero is still zero.

No such interest is even remotely cognizable under the Commerce Clause. Petitioners cite *Carbone* for the proposition that the central purpose of the rule prohibiting discrimination under the Clause is to prohibit state or local law that would "excite those jealousies and retaliatory measures the Constitution was designed to prevent." Pet. 27 (quoting *Carbone*, 511 U.S. at 390). But even if Measure E advantaged some California counties at the expense of others, *intrastate* preferences are not the evils "that had plagued relations *among the Colonies* and later *among the States* under the Articles of Confederation." *Dep't of Revenue v. Davis*, 553 U.S. 328, 338 (2008) (citation and internal quotation marks omitted; emphases added). Indeed, while Petitioners claim that *intrastate* preferences create the sort of rivalries that the Commerce Clause was intended to prevent (Pet. 26-27), the Courts of Appeals have repeatedly held that local ordinances authorizing intrastate (but not interstate) discrimination raise no issues under the Commerce Clause. *See Grant's Dairy-Maine*, 232 F.3d at 22 ("The dormant Commerce Clause does not protect intrastate competition"); *see* n.9, *supra* (collecting cases holding that intrastate flow control ordinances are not discriminatory under the Commerce Clause).

Moreover, even if Petitioners could show that preventing discrimination between in-county and out-of-county (but in-state) entities was within the "zone of interests" protected by the Commerce Clause, they would still not have prudential standing because the discrimination alleged in this case is discrimination *between public entities*. In *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330 (2007), this Court held that "laws that favor the government" in areas like solid waste handling "but treat every private business, whether in-state or out-of-state, exactly the same[,] do not discriminate against interstate commerce for purposes of the Commerce Clause." *Id.* at 334; *accord id* at 342 ("States and municipalities are not

private businesses—far from it"). Then, in *Department of Revenue v. Davis*, 553 U.S. 328 (2008), the Court held that the Commerce Clause is not violated by discrimination between in-state and out-of-state *governments*. The Court thus upheld facially discriminatory provisions of the Kentucky tax code that exempted from state taxation interest on Kentucky bonds but not interest on bonds issued by other states. Reiterating that "governmental public preference is constitutionally different from commercial private preference" (*id.* at 341 n.9), the Court held that there was "no forbidden discrimination" in Kentucky's unequal treatment of in-state and out-of-state bonds "because Kentucky, as a public entity, does not have to treat itself as being 'substantially similar' to the other bond issuers in the market." *Id.* at 343.

That principle forecloses Petitioners' discrimination claim. As this Court has recently recognized, the "modern law of what has come to be called the dormant Commerce Clause is driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Davis*, 553 U.S. at 337-38 (quoting *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988)). Petitioners' claim that Measure E discriminates against out-of-county (but in-state) public entities in favor of other public entities located in the same state involves neither "in-state economic interests" (*i.e* , local businesses) nor their "out-of-state competitors." Accordingly, Petitioners' discrimination claim does not come within the "zone of interests" protected by the Commerce Clause.

B. Sound Policy Reasons Support The Denial Of Prudential Standing.

The prudential standing requirements are "founded in concern about the proper—and properly limited—role of the

courts in a democratic society." *Bennett v Spear*, 520 U.S. 154, 162 (1997). In particular, the "zone of interests" test for prudential standing "serves primarily to advance the separation of powers values that constitute a central concern of standing principles in general." *Branch Bank & Trust Co. v. Nat'l Credit Union Admin. Bd.*, 786 F.2d 621, 624 (4th Cir. 1986). It also lets the federal judiciary "avoid deciding questions of broad social import where no individual rights would be vindicated." *Gladstone, Realtors v Village of Bellwood*, 441 U.S. 91, 99-100 (1979).

Those values will be seriously undermined if Petitioners are found to have prudential standing to raise their Commerce Clause claims. As discussed above, Measure E does not affect *any* existing interstate commerce. If Petitioners can nevertheless challenge the ordinance as a violation of the Commerce Clause, *every* measure adopted by a state or local government that adversely affects local businesses will be subject to federal court scrutiny to determine, *inter alia*, whether its benefits are disproportionate to its burdens in violation of the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Worse still, if these Petitioners can initiate such a lawsuit, so can any other plaintiff, despite the lack of any nexus between its potential claims and its ability to engage in interstate commerce. In that event, the result would be "unprecedented and unbounded interference by the courts with state and local government" (*United Haulers Ass'n*, 550 U.S. at 343), as federal courts would be flooded with challenges to state and local environmental and economic regulations and the separation of powers that underlies the "zone of interests" tests would be seriously impaired.

Absent a demonstrated impact on existing interstate commerce, challenges to such ordinances should be brought in the state courts and adjudicated under state law. As this Court has recently recognized, "[w]aste disposal is both typically and traditionally a local government function." *Id.* at

344 (citation and internal quotation marks omitted). Indeed, "Congress itself has recognized local government's vital role in waste management, making clear that 'collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies.'" *Id.* (quoting 42 U.S.C. §6901(a)(4)). It is therefore no accident that the litigants in this case consist primarily of local governments and officials, all located within California.

Whether the County and its citizens must suffer the flies, odors and health concerns caused by Petitioners' efforts to find a cheap and convenient place to dispose of their sewage is therefore a policy decision that belongs in the first instance to the California Legislature. Indeed, Petitioners themselves claim that Measure E is inconsistent with—and therefore preempted by—state law, and this claim was upheld by the District Court. Pet. 7; Pet. App. 65-89. That is the appropriate battleground on which to resolve this litigation; the Commerce Clause has no role in resolving this intrastate dispute.[17]

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[17]One *amicus* disparages the state courts' ability to handle such claims, contending that state forums are "not as familiar with federal Commerce Clause . . . issues" and "will also be in the jurisdiction that passed the offending legislation and . . . subject to intense pressure to uphold bans targeting urban wastes from outside the county." NACWA Br. 23. However, this Court has repeatedly rejected the contention that the state courts are less competent than the federal courts to consider federal constitutional claims. *Rose v Lundy*, 455 U.S. 509, 518 (1982) ("Under our federal system, the federal and state courts are equally bound to guard and protect rights secured by the Constitution") (citation, internal quotation marks and brackets omitted); *Stone v. Powell*, 428 U.S. 465, 494 n 35 (1976) ("[W]e are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States"). Moreover, under California law any dispute between Petitioners and Kern County would be heard in a Superior Court located in a neutral county. CAL. CODE CIV. PROC. §394(a). *Amicus'* claim that such a court would be biased in favor of Respondents is preposterous.

CONCLUSION

The Petition should be denied.

DATED: April 30, 2010.

Respectfully,

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